

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 659.

THE CUNARD STEAM SHIP COMPANY, LTD., AND ANCHOR
LINE (HENDERSON BROS.) LTD., APPELLANTS,

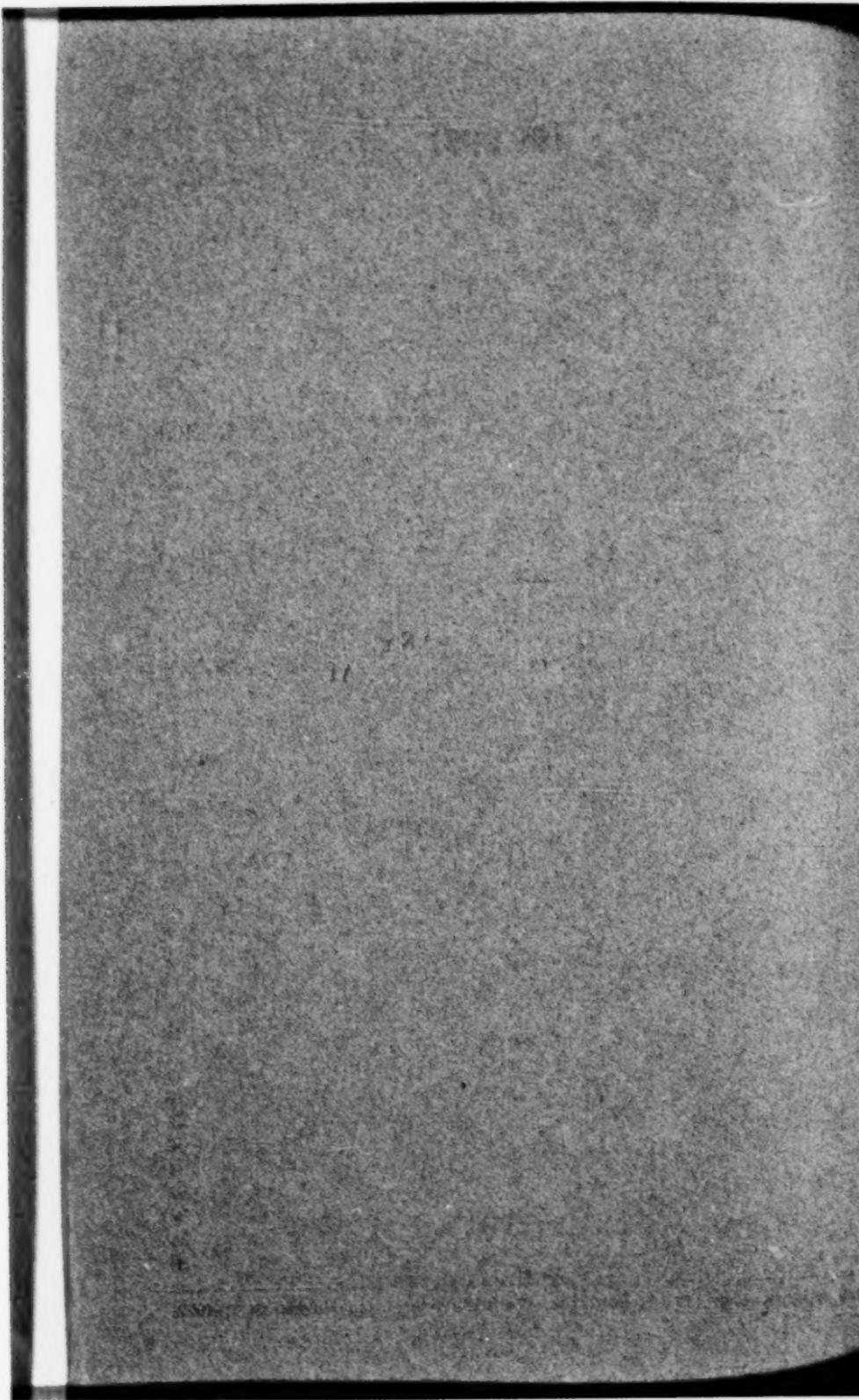
vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY
OF THE UNITED STATES, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 25, 1922.

(29,200)



(29,209)

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1

Equity Subpœna.

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 11th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

[SEAL.]

ALEX GILCHRIST, JR.,
*Clerk.*LORD, DAY & LORD,
Plaintiffs' Sol'rs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,
Clerk.

2 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (Henderson Brothers), Limited, Complainants,
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainants, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, corporations, bring this, their Bill of Complaint against the above named defendants and respectfully show unto this Honorable Court as follows:

I. Complainant, The Cunard Steamship Company, Limited, is a corporation duly organized and existing under the laws of the
3 United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England.

II. Complainant, Anchor Line (Henderson Brothers) Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Glasgow, Scotland.

III. Complainants are informed and verily believe and therefore allege on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and that said defendant is and his subordinates are by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of the said Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the

4 Port of New York wherein the complainants desire to bring their vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainants desire to bring their vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

IV. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand Dollars (\$3,000) in value, exclusive of interest and costs.

V. Complainants were incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years have been engaged in the business of transporting, as common carriers, passengers and cargo for hire on the high seas, and, in transacting such business, the complainants maintain and operate fleets of steamships which ply between ports of the United Kingdom and other ports of Europe (more especially the ports of France and Italy) and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States and fly the British flag. More than twenty-four of such ships carry passengers. Said ships are worth many millions of dollars and they ply regularly and frequently between European ports and the Port of New York. Complainants lease piers known as Piers Numbers 53, 54, 56, 64 and 71 North River, New York City.

VI. The crews operating complainants' vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainants would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

6 VII. Three of the ships of the complainant, The Cunard Steamship Company, Limited, ply regularly between Italian ports and the Port of New York, and other vessels of such complainant occasionally ply between such ports. A considerable number of the crews of such vessels plying from Italian ports are Italian citizens. On such vessels said The Cunard Steamship Company, Limited, carries many third class passengers, and for the accommodation of such passengers it is necessary for the Company to carry a number

of Italian stewards. The Italian law requires that certain officers and members of the crew shall be Italian when third class Italian passengers are carried.

VIII. Complainants allege, on information and belief, that the laws of the Kingdom of Italy provide certain requirements regarding the quantity and quality of the food and alcoholic liquors to be supplied to third class passengers carried between the ports of the United States and the ports of Italy. Among other things, said laws provide that said third class passengers must be furnished with one-half a liter per day of Italian wine containing not less than twelve per cent alcohol, and the rules and regulations established by the Italian Seamen's Federation which have the approval of the Government of the Kingdom of Italy, provide, regarding the Italian members of the crew, that boys and young men who are members
7 of the crew must receive not less than half a liter of wine per day containing not less than twelve per cent alcohol, and that all other seamen must receive three-quarters of a liter of wine per day containing not less than twelve per cent of alcohol, and that firemen and greasers during the time the ship is under way shall receive not less than one liter of wine per day containing twelve per cent alcohol.

Pursuant to the laws of Italy, complainants' vessels cannot sail from the Port of New York for an Italian port and transport more than fifty Italian citizens as third class passengers unless the vessel has received a license from the Italian Consul. Such license cannot be issued until the supplies and wine on board the vessel have been tested by an Inspector of Immigration attached to the Italian Consulate. This license cannot be issued unless there is a sufficient quantity of wine containing not less than twelve per cent of alcohol on board said vessel to furnish the third class passengers during the voyage with the amount of wine required by the Italian law.

IX. The compensation received by complainants for the carriage of passengers amounts in the aggregate to many millions of dollars annually. In the year 1921 more than Twenty-five Million
8 Dollars (\$25,000,000.) was received by the complainants from such passenger business.

Among the passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your complainants are prohibited from furnishing their passengers with alcoholic beverages a large number of passengers, who would otherwise have patronized complainants' ships, will patronize lines landing at Canadian ports.

The prohibition of the use of alcoholic liquors on complainants' vessels as sea stores, for the reasonable use of crew and passengers, would cause your complainants great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business exceeding One Million Dollars (\$1,000,000.) a year, and will involve irreparable damage to your com-

plainants, in that it will destroy a considerable part of their business and render a considerable part of their equipment useless and cause a loss of their profits.

X. Since the adoption of the so-called National Prohibition Act on October 28, 1919, complainants' ships have been permitted freely to go and come in the Port of New York and to carry intoxicating liquors for beverage purposes as sea stores for crew and passengers, pursuant to the regulations of the Secretary of the Treasury, which provided that such liquor should be locked up and sealed with customs seals upon the arrival of the vessel at the territorial waters of the United States and kept so sealed until said vessel left such territorial waters.

XI. All of the alcoholic liquors carried as such sea stores on complainants' vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at European ports, and no part of such liquors is intended to be landed in the United States.

XII. Complainants are informed and verily believe and therefore allege, that on or about the sixth day of October, 1922, the Attorney General of the United States rendered a ruling or opinion in which, among other things he ruled that foreign ships carrying intoxicating beverage liquors as ships stores, within the three mile limit of our shores, are violating the provisions of the National Prohibition Act prohibiting possession or transportation of intoxicating liquor for beverage purposes, and that thereafter the President of the United States directed the defendant, the Secretary of the Treasury, to proceed to the formulation of regulations for the enforcement of such ruling with respect to foreign ships.

Complainants are informed and believe that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General.

XIII. Complainants are advised by counsel and verily believe that the aforesaid rulings by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships stores for crew or passengers, and any regulations formulated by the Secretary 11 of the Treasury for the enforcement of such ruling are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibit the carriage of such liquors as such sea stores for crew and passengers, and an interference with the carriage of such sea stores would, therefore, violate complainants' rights under existing treaties between the United States and Great Britain and otherwise.

XIV. Complainants are advised by counsel, and verily believe, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XV. Complainants allege that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General of such regulations, 12 the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, it is, nevertheless, the intent and threat of the defendants herein to seize said alcoholic liquors now constituting sea stores on complainant's vessels (some of which are now on the high seas bound for the Port of New York) and to enforce against the complainants, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations and thus involve the complainants, their officers, agents and servants, in numerous suits and by such threats to prevent complainants, 13 their employees and servants, from carrying out its contracts in the Port of New York, and thus deprive the Complainants of their business; all to the irreparable damage of Complainants, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, Complainants would be involved in numerous suits if they were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture. Complainants allege that in order successfully to carry on its business of transporting passengers and freight to the ports of the United States, it is necessary and essential for it to make contracts with passengers and crew, which contracts under the laws of Italy, as above set forth, must provide for the furnishing of Italian wines as aforesaid, and that such contracts must be made prior to the departure of your Complainant's ships from the ports of Italy; that unless the Complainants can immediately procure from this Honorable Court relief in the premises, no such contracts can reasonably or safely be made; that there will be in that event a cessation of Complainant's business for an indefinite and probably considerable time; such ces-

14 sation of business will involve irreparable damage to Complainants in that it will destroy a considerable part of their business and renders a considerable part of their equipment useless.

Forasmuch, therefore, as complainants are without remedy in the premises, except in a court of equity and to the end that they may obtain from this Honorable Court the relief to which they are entitled, they respectfully pray that the above named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainants, their officers, servants and employees, or any of them, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainants, their officers, agents, servants or employees, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment

15 or the National Prohibition Act, on the ground or claim that the carriage of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law.

Complainants further pray that they be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subp  na be issued herein directed to said defendants, commanding them on a day set to appear and answer the Bill of Complaint herein.

THE CUNARD STEAMSHIP COMPANY,
LIMITED,
By T. ASHLEY SPARKS,

Agent.

ANCHOR LINE (HENDERSON BROTHERS), LTD.,
By T. ASHLEY SPARKS,

Agent.

LORD, DAY & LORD,

Solicitors for Complainants.

25 Broadway, New York City.

LUCIUS H. BEERS,

FRANKLIN B. LORD,

Of Counsel for Complainants.

16 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

On this 11th day of October, 1922, before the undersigned, a Notary Public, duly commissioned and sworn, appeared Sir T. Ashley Sparks, K. B. E., who being duly sworn deposes and says, that he is the General Agent in the United States of and for The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, the complainants in the above entitled suit; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information, and as to those matters he believes them to be true.

T. ASHLEY SPARKS.

Sworn to before me this 11th October, 1922.

[SEAL.]

EMILIO TRIPPITELLI,
Notary Public, Kings County.

Certificate filed in New York County.

My commission expires 3/30/24.

17 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (HENDERSON BROTHERS), LIMITED, Complainants,
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

On reading the annexed Bill of Complaint, let the defendants herein show cause before this Court at a Term thereof for the hearing of motions to be held at Room 237 the Post Office Building, Borough of Manhattan, City of New York, on the 17th day of October, 1922, at 2:30 p. m. in the *forenoon* of that day, or as soon thereafter as counsel can be heard, why an order should not be made restraining the defendants, their agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing, removing or in any way interfering with intoxicating beverages, liquors or wines or any of them carried on complainants' ships as ship's stores, as more particularly set forth in the Bill of Complaint herein, and restraining the defendants, their agents, servants and subordinates, during the pendency of this suit, from seizing, disturbing or in any way interfering with complainants' said ships by reason of

the carriage thereon of said intoxicating beverages, liquors and wines as such ship's stores, and why the complainants should not have such other and further relief as may be just.

Sufficient cause appearing, service of a copy of this order on the defendants on or before the 13th day of October, 1922, shall be sufficient service.

Dated, New York, October 11th, 1922.

LEARNED HAND,
United States District Judge.

19 U. S. District Court, Southern District of New York.

E. 25/6.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainants,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

Notice of Appearance and Demand.

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,
United States Attorney,
Attorney for Defendants.

New York, October 13, 1920.

To Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York.

20 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (HENDERSON BROTHERS), LIMITED, Complainants,
against

ANDREW W. MELLON, Secretary of the Treasury of the United States,
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainants, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, corporations, bring this, their Amended Bill of Complaint against the above named defendants and respectfully show unto this Honorable Court as follows:

I. Complainant, The Cunard Steamship Company, Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business in Liverpool, England.

21 II. Complainant, Anchor Line (Henderson Brothers) Limited, is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Glasgow, Scotland.

III. Complainants are informed and verily believe and therefore allege on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and that said defendant is and his subordinates are by law charged with the duty of enforcing the terms and provisions of the Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such Acts of Congress.

The defendant Henry C. Stuart is a subordinate of the said Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury which from time to time may be promulgated, within that portion of the Port of New York wherein the complainants desire to bring their vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the 22 State of New York which State embraces that portion of the Port of New York wherein the complainants desire to bring their vessels equipped as aforesaid, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

IV. This is a suit of civil nature, arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.) in value, exclusive of interest and costs.

V. Complainants were incorporated under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and for many years have been engaged in the business of transporting, as common carriers, passengers and cargo for hire on the high seas, and, in transacting such business, the complainants maintain and operate fleets of steamships which ply between ports of the United Kingdom and other ports of Europe (more especially the ports of France and Italy) and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States and fly the British 23 flag. More than twenty-four of such ships carry passengers.

Said ships are worth many millions of dollars and they ply regularly and frequently between European ports and the Port of New York. Complainants lease piers known as Piers Numbers 53, 54, 56, 64 and 71 North River, New York City.

VI. The crews operating complainants' vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainants believe they would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into, or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainants' vessels as aforesaid have been legally acquired.

24 VII. Three of the ships of the complainant, The Cunard Steamship Company, Limited, ply regularly between Italian ports and the Port of New York, and other vessels of such complain-

ant occasionally ply between such ports. A considerable number of the crews of such vessels plying from Italian ports are Italian citizens. On such vessels said The Cunard Steamship Company, Limited, carries many third class passengers, and for the accommodation of such passengers it is necessary for the Company to carry a number of Italian stewards. The Italian law requires that certain officers and members of the crew shall be Italian when thir class Italian passengers are carried.

VIII. Complainants allege, on information and belief, that the laws of the Kingdom of Italy provide certain requirements regarding the quantity and quality of the food and alcoholic liquors to be supplied to third class passengers carried between the ports of the United States and the ports of Italy. Among other things, said laws provide that said third class passengers must be furnished with one-half a liter per day of Italian wine containing not less than twelve per cent alcohol, and the rules and regulations established by the

25 Italian Seamen's Federation which have the approval of the Government of the Kingdom of Italy, provide, regarding the

Italian members of the crew, that boys and young men who are members of the crew must receive not less than half a liter of wine per day containing not less than twelve per cent alcohol, and that all other seamen must receive three-quarters of a liter of wine per day containing not less than twelve per cent of alcohol, and that firemen and greasers during the time the ship is under way shall receive not less than one liter of wine per day containing twelve per cent alcohol.

Pursuant to the laws of Italy, Complainants' vessels cannot sail from the Port of New York for an Italian port and transport more than fifty Italian citizens as third class passengers unless the vessel has received a license from the Italian Consul. Such license cannot be issued until the supplies and wine on board the vessel have been tested by an Inspector of Immigration attached to the Italian Consulate. This license cannot be issued unless there is a sufficient quantity of wine containing not less than twelve per cent of alcohol on board said vessel to furnish the third class passengers during the voyage with the amount of wine required by the Italian law.

IX. The compensation received by Complainants for the carriage of passengers amounts in the aggregate to many millions 26 of dollars annually. In the year 1921 more than Twenty-five million Dollars (\$25,000,000) was received by the Complainants from such passenger business.

Among the passenger vessels regularly crossing the North Atlantic from European ports are many which land at Canadian ports, and if your Complainants are prohibited from furnishing their passengers with alcoholic beverages a large number of passengers, who would otherwise have patronized Complainants' ships, will patronize lines landing at Canadian ports.

The prohibition of the use of alcoholic liquors on Complainants' vessels as sea stores, for the reasonable use of crew and passengers, would cause your Complainants great pecuniary loss by reason of the difficulty of obtaining crews, and would cause a great loss of receipts

from their passenger business and will involve irreparable damage to your Complainants, and Complainants believe it will destroy a considerable part of their business and render a considerable part of their equipment useless and cause a loss of their profits.

X. Since the adoption of the so-called National Prohibition

27 Act on October 28, 1919, Complainants' ships have been permitted freely to go and come in the port of New York and to carry intoxicating liquors for beverage purposes as sea stores for crew and passengers, pursuant to the regulations of the Secretary of the Treasury hereto annexed and marked Schedule A and Schedule B, and reference thereto is prayed.

In reliance upon and under the authority of the above mentioned Treasury Decision and the Regulations promulgated in connection therewith and the procedure always followed as above described, complainants in good faith purchased in foreign ports and now have on board their vessels on the high seas bound for the United States, as sea stores, quantities of intoxicating liquor of a value in excess of Three Thousand Dollars (\$3,000).

XI. All of the alcoholic liquors carried as such sea stores on Complainants' vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board Complainants' vessels at European ports, and no part of such liquors is intended to be landed in the United States.

XII. Complainants are informed and verily believe and therefore 28 allege that on or about the 6th day of October, 1922, the Attorney General of the United States rendered a ruling or opinion in which, among other things, he ruled that foreign ships carrying intoxicating beverage liquors as ships' stores, within the three mile limit of our shores, are violating the provisions of the National Prohibition Act prohibiting possession or transportation of intoxicating liquor for beverage purposes, and that thereafter the President of the United States directed the defendant, the Secretary of the Treasury, to proceed to the formulation of regulations for the enforcement of such ruling with respect to foreign ships.

Complainants are informed and believe that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General.

XIII. Complainants are advised by counsel and verily believe that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ship's stores for crew or passengers, and any regulations formulated by the Secretary of the

29 Treasury for the enforcement of such ruling are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the

carriage of such liquors as such sea stores for crew and passengers, and an interference with the carriage of such sea stores would, therefore, violate complainants' rights under existing treaties between the United States and Great Britain and otherwise, and also would deprive complainants of their property without due process of law.

XIV. Complainants are advised by counsel and verily believe that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon and in the exercise of the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

XV. Complainants allege that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the 30 defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart and Ralph A. Day, are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General, is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act if it purports to prohibit the carriage of said alcoholic beverages as sea stores for crew and passengers, is unconstitutional and void for the reasons hereinabove stated, it is, nevertheless, the intent and threat of the defendants herein to seize said alcoholic liquors now constituting sea stores on complainants' vessels (some of which are now on the high seas bound for the Port of New York) and to enforce against the complainants, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations and thus involve the complainants, their officers, agents and servants, in numerous suits and by such threats to prevent complainants, their employees and servants, from 31 carrying out its contracts in the Port of New York, and thus deprive the complainants of their business; all to the irreparable damage of complainants, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainants would be involved in numerous suits if they were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture. Complainant, The Cunard Steamship Company, Ltd., alleges that in carrying on its business of transporting passengers and freight to the ports of the United States, it has made contracts with passengers and crew, which contracts under the laws of Italy, as above set forth, must provide for the furnishing of Italian wines as aforesaid, and that such contracts must be made prior to the departure of said complainants' ships from

the ports of Italy; that unless the said complainant can immediately procure from this Honorable Court relief in the premises, no such contracts can reasonably or safely be made; complainants believe they will suffer irreparable damage in that a considerable part of their business will be destroyed and a considerable part of their equipment rendered useless.

For as much, therefore, as complainants are without remedy in the premises, except in a court of equity and to the end that 32 they may obtain from this Honorable Court the relief to which they are entitled, they respectfully pray that the above named defendants and each of them be directed to make a full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being expressly waived, and that said defendants their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainants, their officers, servants and employees, or any of them, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainants, their officers, agents, servants or employees, or any of them, or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment or the National Prohibition Act, on the ground or claim that the carriage of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law.

Complainants further pray that they be granted a restraining order and preliminary injunction pending the final hearing 33 and decision of this cause whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainants further pray that a writ of subpoena be issued herein directed to said defendants commanding them on a day set to appear and answer the Bill of Complaint herein.

THE CUNARD STEAMSHIP COMPANY, LIMITED,
By T. ASHLEY SPARKS,

ANCHOR LINE (HENDERSON
BROTHERS) LTD.,
By T. ASHLEY SPARKS,

LORD, DAY & LORD,

Solicitors for Complainants.

25 Broadway, New York City.

LUCIUS H. BEERS,
FRANKLIN B. LORD,
Of Counsel for Complainants.

On this 16th day of October, 1922, before the undersigned, a Notary Public, duly commissioned and sworn, appeared Sir T. Ashley Sparks, K. B. E., who being duly sworn deposes and says, that he is the General Agent in the United States of and for The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, the complainants in the above entitled suit; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information, and as to those matters he believes them to be true.

T. ASHLEY SPARKS.

Sworn to before me this 16th day of October, 1922.

[SEAL.]

THOMAS F. LARKIN,
Notary Public.

New York County Clerk's No. 354.

New York County Register's No. 4296.

Commission expires March 30, 1924.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 103 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To Collectors of Customs and Others Concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importations, but are subject to seizure and forfeiture.

36 Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the

coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

(99623.)

JOUETT SHOUSE,
Assistant Secretary.

37

SCHEDULE B.

(Copy.)

(T. D. 38248.)

Sea Stores.—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered by the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,
Assistant Secretary.

(108377.)

39 United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE
(HENDERSON BROTHERS), LIMITED, Complainants,
against

ANDREW W. MELLON, Secretary of the Treasury of the United States;
Henry C. Stuart, Acting Collector of Customs for the Port of
New York, and Ralph A. Day, Federal Prohibition Director for
the State of New York, Defendants.

Answer to Amended Bill of Complaint.

Now come the defendants herein and in answer to the amended bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the amended bill of complaint herein and divers parts thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.
2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.
4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.
5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.
6. It appears from the bill that the complainants have a plain, adequate and complete remedy at law.

Second. In answer to the allegations set out in paragraph six of the complaint the defendants allege on information and belief that any difficulty which complainants might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American Merchant Marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph thirteenth of the amended bill of complaint that the ruling made by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainants' rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph fourteenth of the amended bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the

41 Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the

Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional. The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainants are correct in their construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainants if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels

42 used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils

of this traffic but if, as complainants contend, it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainants, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N. S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors listed as sea stores. The said vessel came into the port of Portland,

43 Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainants have relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy to the neighborhood of New York where she was met by the coastguard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have plead guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been

44 given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory return- by such foreign vessels of the amount of liquors actually found when seals are broken at the territorial limits of the United States.

Tenth. Defendants are informed and verily believe that the complainants make large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainants herein is granted, but defendants believe that a

large number of passengers who would otherwise travel on
45 American ships and who would travel on American ships if

both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger liners operating in the North Atlantic trade, in competition with complainants' and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its tax-payers.

Wherefore, defendants pray that the amended bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,
*United States Attorney for the Southern District
of New York, Attorney for Defendants.*

Office & P. O. Address: U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

46 United States District Court, Southern District of New York

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE
(HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United
States, et al.,

And Ten Other Cases.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practise, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an opinion at

47 that time given by the Attorney General, was that, as part of the ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of Grogan v. Walker, and Anchor Line v. Aldridge, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in

Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the French, Italian and Belgian ships the law of their 48 flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Zone Officer, but the Collector of the Port of New York and the local Prohibition Director are defendants in all.

Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., the Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for The Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq., and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney, and John Holley Clark, Esq., Assistant U. S. Attorney, for Defendants in all cases.

49 LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan v. Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that, had the liquors here in question been a part of the ship's cargo, the bills would not lie. It makes no difference that they were not to be broached while carried within territory of the United States; the carriage would be transportation none the less. But because they are part of the ship's stores, in the sense that that term is generally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom,

the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," Brough v. Whitmore, 4 Term R. 206, or "appurtenances," The Dundee, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a

transit whose purpose from the beginning is that very delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

50 Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases on which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, Gloucester Ferry Co. v. Pa., 114 U. S. 196, Rhodes v. Iowa, 170 U. S. 412, Louisville & Nashville R. R. v. Cook Brewing Co., 223 U. S. 70, Danegier v. Cooley, 248 U. S. 319. From this it does not follow that the term, "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these, carriers are required to mark the consignor's and consignee's names on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing

51 liquor to make surreptitious traffic in it impossible, and its policy would as well cover movements which might be incidental to, as those which immediately terminated in, a delivery to someone else. The case of Street v. Lincoln Safe Deposit Company, 254 U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the

cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In

52 addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 183, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

Grogan v. Walker, *supra*, and *Anchor Line v. Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is to be dis-

53 tinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed,

specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

54 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, *supra*, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and

55 kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law. The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

56 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended,

and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, *supra*, *Taylor v. U. S.*, *supra*, and *Scharrenberg v. U. S.*, *supra*, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under 58 the Seventy-fourth Rule to grant such an order is undoubted, notwithstanding a dismissal of the bill, *Merrimac River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Stafford v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and I must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the cases at bar will be finally determined long before such libels can be

tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume 59 that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crew's ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing *inter se* and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to 60 ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge, the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal, if the same be taken at once. Settle orders on notice.

October 23, 1922.

LEARNED HAND,
D. J.

61 At a Stated Term of the District Court of the United States for the Southern District of New York held in the Court Rooms thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 24th day of October, 1922.

Present: Honorable Learned Hand, District Judge.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (HENDERSON BROTHERS), LIMITED, Complainants,
against

ANDREW W. MELLON, Secretary of the Treasury of the United States
Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

Order Dismissing Complaint.

This cause came on to be heard at this term upon motions by the defendants to dismiss the amended bill of complaint and by the plaintiffs for a final decree in their favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decree that the amended bill of complaint herein be dismissed and defendants have judgment against the complainants for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants, their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainants herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in the penal sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainants otherwise than as crews' rations to the crews of complainants' vessels; and it is further

Ordered, adjudged and decreed that if complainants shall fail to take an appeal herein to the Supreme Court of the United States within five days from the entry hereof, or to move for preference on

first motion days, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,
U. S. D. J.

63 In the District Court of the United States for the Southern District of New York.

In Equity.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (HENDERSON BROTHERS), LIMITED, Complainants,
against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

The complainants above named, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers), Limited, corporations conceiving themselves aggrieved by the final decree made and entered in the above entitled cause on the 24th day of October, 1922, do hereby appeal from such final decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court of

64 the United States under Section 238 of the Judicial Code, and said The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, pray that they be allowed this appeal and that a transcript of the record, papers, and proceedings, upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 24th, 1922.

LORD, DAY & LORD,
Solicitors for Complainants.

Office & P. O. Address, 25 Broadway, New York City.

Appeal allowed.

LEARNED HAND,
Judge.

65 & 66

Citation on Appeal.

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit, to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the City of Washington, District of Columbia, within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Cunard Steamship Company, Ltd., and Anchor Line (Henderson Brothers, Ltd.) are appellants and you are the appellees to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 24th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,
*United States District Judge for the Southern
 District of New York, in the Second Circuit.*

67 In the District Court of the United States for the Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LIMITED, and ANCHOR LINE (HENDERSON BROTHERS), LIMITED, Complainants,
 against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, Defendants.

Now come the complainants, The Cunard Steamship Company, Limited, and Anchor Line (Henderson Brothers) Limited, Corporations, and file the following assignment of errors upon which they will rely on their appeal from the final judgment or decree entered on the 24th day of October, 1922:

First. The Court erred in dismissing the bill of complaint herein.
 Second. The Court erred in denying the petition for an injunction.

68

Third. The Court erred in holding that the Eighteenth Amendment prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken 69 on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainants' vessels would deprive the complainants of their property and subject them to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainants' vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes 70 a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainants' vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the Fifth and Sixth Assignments of error constitutes

a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the Third, Fourth, Fifth and Sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the Ninth assignment of error rendered the same unconstitutional and invalid and not within the powers conferred upon the Congress by the Constitution.

71 Wherefore, complainants-appellant- pray that the said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainants as prayed for in its amended Bill of Complaint herein and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 24, 1922.

LORD, DAY & LORD,
Solicitors for Complainants-Appellants.

Office & P. O. Address, #25 Broadway, Borough of Manhattan,
City of New York.

72 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY, LTD., and Another,
vs.

ANDREW W. MELLON et al.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated October 24th, 1922.

LORD, DAY & LORD,
Attorneys for Complainants.
WM. HAYWARD,
Attorney for Defendants.

73 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE
(HENDERSON BROTHERS), LTD.,

vs.

ANDREW W. MELLON et al.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 24th day of October, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR., Clerk.

Endorsed on cover: File No. 29,209. S. New York D. C. U. S. Term No. 659. The Cunard Steamship Company, Ltd., and Anchor Line (Henderson Bros.), Ltd., appellants, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 25th, 1922. File No. 29,209.

(7625)